UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

David S. Suss, **CASE NO. 96-20079**

Debtor(s).

Mary Presutti, Administratrix of the Estate of Santo D. Lanovara,

Plaintiff(s), **A.P. NO. 96-2096**

vs.

David S. Suss, **DECISION & ORDER**

Defendant(s).

BACKGROUND

On January 12, 1996, David S. Suss (the "Debtor") filed a petition initiating a Chapter 7 case. On his schedule F, Creditors Holding Unsecured Nonpriority Claims, the Debtor listed the Estate of Santo D. Lanovara (the "Lanovara Estate"), in care of Mary Presutti, 1017 Heritage Park Drive, Webster, New York 14580, as having a $1,800,000.00 disputed claim for the alleged misappropriation of funds.

On January 25, 1996, a Section 341 Meeting Notice (the "341 Notice") was issued and mailed which indicated that: (1) a meeting of creditors had been scheduled for February 15, 1996; and (2) the deadline to file a Complaint objecting to the discharge of the Debtor or to determine the dischargeability of certain types of debts was April 15, 1996. [1] The Clerk's Certificate of Mailing

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[1] The Section 341 Meeting Notice also included the following language:

indicated that the Section 341 Notice was forwarded to the entities set forth on a matrix filed by the Debtor, which included the following: (1) Estate of Santo D. Lanovara, in care of Mary Presutti, 1017 Heritage Park Drive, Webster, New York 14580; and (2) Anthony F. Leonardo, Jr., 30 West Broad Street, Suite 500, Irving Place, Rochester, New York 14614 ("Attorney Leonardo").

On February 16, 1996, the case Trustee filed a minute report of the February 15, 1996 Section 341 hearing which indicated that no one had appeared on behalf of the Lanovara Estate at the hearing.

On February 27, 1996 an unsecured priority Proof of Claim was filed on behalf of the Lanovara Estate (the "Lanovara Claim") in the amount of $400,000.00. The Lanovara Claim had attached to it photocopies of a February 19, 1996 Amended Summons (the "Summons") and a February 19, 1996 Verified Amended Complaint (the "Complaint") in an action pending in the Supreme Court, State of New York, County of Monroe, captioned, Mary Presutti, Administratrix of the Estate of Santo D. Lanovara, Plaintiff, against David Suss, Individually, and as a Partner of Suss, DeMott & Smith, Defendants (the "State Court Action"). The photocopies of the Summons and Complaint indicated that they had been filed on February 20, 1996 with the Monroe County Clerk's Office.

The debtor is seeking a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under Sec. 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under Sec. 523(a)(2),(4),(6) or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth.

The Complaint included six causes of action, a first cause of action for conversion; a second cause for fraud; a third cause of action for breach of contract; a forth cause of action for unjust enrichment; a fifth cause of action for breach of fiduciary duty; and a sixth cause of action for negligence.

On April 17, 1996, an Order was entered discharging the Debtor from all of his debts (the "Discharge Order").

On April 24, 1996, by the filing of a complaint (the "Bankruptcy Complaint"), which did not include the causes of action for breach of contract and negligence that had been included in the Complaint, and other required papers and the payment of the required fee, the Lanovara Estate commenced an Adversary Proceeding (the "Adversary Proceeding") against the Debtor which specifically requested a determination as to the dischargeability of his alleged debt.

On May 8, 1996, the Debtor filed a Motion (the "Dismissal Motion") requesting that the Court dismiss the Adversary Proceeding with prejudice on the merits because the Proceeding was commenced after April 15, 1996, the last day set by the Court and Rule 4007(c) to file a complaint to determine the dischargeability of any of the Debtor's debts.

On May 28, 1996, the Lanovara Estate filed a Cross Motion (the "Cross Motion") requesting the Court determine that: (1)the Complaint, which was included as an attachment to the Lanovara Claim, was a filed complaint sufficient to have commenced an adversary proceeding under Section 523(c) and Rule 7001; and (2) the Complaint was amended by the Bankruptcy Complaint filed on April 24, 1996, which cured a number of minor errors and omissions in the Complaint such as the caption and prayer for relief.

The Cross Motion alleged that: (1) the Estate had filed the Complaint as an attachment to the Lanovara Claim on February 27, 1996, a time prior to the April 15, 1996 deadline to file a complaint to determine the dischargeability of a debt; (2) prior to the filing of the Lanovara Claim, a copy of the Complaint had been served by mail on the Debtor's attorney in the State Court Action which had been commenced in November, 1995, prior to the filing of the Debtor's petition; (3) the Complaint was inadvertently filed with the Bankruptcy Court and served upon the Debtor's attorney in the State Court Action without editing its caption from a New York State Supreme Court proceeding to a Bankruptcy Court proceeding or changing the relief requested to include a request for the denial of dischargeability; (4) in filing the Lanovara Claim with photocopies of the Complaint attached, the Estate and Attorney Leonardo, the attorney for the Estate, intended to commence an adversary proceeding against the Debtor to prevent the discharge of his debt to the Estate; and (5) there was no prejudice to the Debtor because the Complaint was served on the Debtor's State Court attorney prior to April 15, 1996, thus giving the Debtor timely notice of the Estate's intention to collect the debt.

On June 4, 1996, the Lanovara Estate filed a Memorandum of Law which asserted that: (1) the defects in the caption and request for relief in the Complaint did not warrant dismissal of the Adversary Proceeding since the Complaint, when taken as a whole, fairly put the Debtor and the Bankruptcy Court on notice of the relief being sought, which was a request for a determination of dischargability; (2) the Lanovara Claim put the Debtor and the Court on notice that the Estate was objecting to the discharge of his debt to it; (3) service had been completed within 120 days from the filing of the Complaint in accordance with the Rules of Bankruptcy Procedure; (4) the failure of the

Lanovara Estate to initially pay a filing fee, which was ultimately paid with the filing of the Bankruptcy Complaint on April 24, 1996, should not foreclose the Estate from proceeding with this claim on the merits.

On June 5, 1996, the return date of the Dismissal Motion and the Cross Motion, the Court heard oral argument and allowed the parties until June 17, 1996 to make any further submissions.

On June 17, 1996, the Debtor filed a Memorandum of Law and the Affidavit of the attorney who had represented him in the State Court Action ("Attorney Kirby").

DISCUSSION

I. RELEVANT STATUTES, RULES AND NOTICES

Section 523(c)(1) of the Bankruptcy Code provides that:

> (c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

Section 523(a) of the Bankruptcy Code provides in pertinent part:

> Exceptions to discharge.
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt——
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by——
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

Rule 4007(c) of the Rules of Bankruptcy Procedure (the "Rules") provides that:

Determination of Dischargeability of a Debt.
(c) Time for Filing Complaint Under § 523(c) in Chapter 7 Liquidation, Chapter 11 Reorganization, and Chapter 12 Family Farmer's Debt Adjustment Cases; Notice of Time Fixed. A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The Court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Rule 4007(e) of the Rules of Bankruptcy Procedure provides that:

(e) Applicability of Rules in Part VII. A proceeding commenced by a complaint filed under this rule is governed by Part VII of these rules.

Rule 7001(6) of the Rules of Bankruptcy Procedure provides that:

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding: (6) to determine the dischargeability of a debt.

Rule 7003 of the Rules of Bankruptcy Procedure provides that:

Rule 3 of the Federal Rules of Civil Procedure (the "F.R.C.P.") applies in adversary proceedings.

Rule 3 of the Federal Rules of Civil Procedure provides that:

A civil action is commenced by filing a complaint with the Court.

Rule 9011 provides in pertinent part:

Signing and verification of papers

> (a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. . . . If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required.

Rule 7004 of the Rules of Bankruptcy Procedure provides that:

> Rule 4(a) and (b) of the Federal Rules of Civil Procedure applies in adversary proceedings. Those rules provide that:
> (a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.
> (b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

A Notice (the "Court Notice") issued by the United States Bankruptcy Court-WDNY Rochester Division, which is available at the Clerk's office and is included in an attorney packet provided to all attorneys upon their admittance to practice in the Bankruptcy Court, provides that:

> The Court requires the following when a party is filing an adversary proceeding in this Court:
> (1) a complaint signed by the attorney or the debtor (if pro se). Only the original is required.
> (2) An Adversary Proceeding Cover Sheet (must have complete names & addresses of the Plaintiff and Defendant).

> (3) One Summons which the attorney prepares (names of the debtor, plaintiff and defendant; Bankruptcy Case No.; Address of the Clerk and the Name & Address of Plaintiff's Attorney).
> (4) A fee of $120.00 (Note exceptions below).
> Once the adversary proceeding has been processed, copies of the completed summons will be mailed back to the attorney along with a letter which explains proper service and what procedure should be followed if there is no answer by the defendant.

II. THE COMMENCEMENT OF AN ADVERSARY PROCEEDING

The time requirements set forth in Rule 4007(c) have been addressed by numerous courts.[2] This Court has previously discussed the issue within the context of a request to amend a complaint:

> The 60-day period following the first date set for the meeting of creditors is not phrased as a statute of limitations but functions as such. *In re Barnes*, 96 B.R. 833, 836 (Bankr. N.D.Ill. 1989). The deadline protects debts [sic] from post-discharge harassment by creditors claiming that their debts are not dischargeable on grounds of fraud. *Id*. at 837. Because of this, for creditors who have missed the deadline and seek untimely extension of their time to object to discharge, the deadline has been described as being "set in stone." *Id*. Despite the harsh results, the court has no discretion to extend the deadline. *Id*. The rigid adherence to the deadline is based on the fact that Bankruptcy Rules 4007(c) and 9006(b)(3) reflect a considered determination that a final cut off date insuring debtors will be free after a date certain outweighs the individual hardship to creditors. *In re Klein*, 64 B.R. 372, 375 (Bankr. E.D.N.Y. 1986) (citation omitted).

In re Rodriguez, No. 92-23388, Adv. No. 93-2076, slip op. at 8 (Bankr. W.D.N.Y. Sept. 30, 1993).

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[2] For a comprehensive summary of the case law regarding the timely filing of complaints under both Rules 4004 and 4007, see *In re Dombroff*, 192 B.R. 615, 618-20 & nn.6-11 (S.D.N.Y. 1996).

In this case the Complaint, which was attached to the Lanovara Claim when the Claim was filed with the Court, but was not itself separately presented to the Clerk's Office for filing, did not constitute the filing of a complaint as required by Section 523(c), Rules 7001 and 7003, Rule 3 of the F.R.C.P. and the Court Notice.

The Complaint itself: (1) in no way indicated that it was a pleading in a matter before the Bankruptcy Court in the Debtor's Chapter 7 case; (2) was captioned as a State Court Action; (3) was filed with Monroe County Clerk's Office in the State Court Action before it was served, but not with the Bankruptcy Court; (4) did not contain a prayer for relief under the Bankruptcy Code or the Rules (Section 523(c) or otherwise); (5) was only a photocopy of a document and not an original document; and (6) was not signed by an attorney of record as required by Rule 11 of the F.R.C.P., adopted by Rule 9011 of the Rules, and the Court Notice. As such, the Complaint, when filed as an attachment to the Lanovara Claim, was insufficient to commence an adversary proceeding to determine the dischargeability of the Lanovara Claim as is required by Section 523(c) and Rules 7001 and 7003.

Because the filing of the Complaint as an attachment to the Lanovara Claim did not commence an adversary proceeding, the Bankruptcy Complaint filed on April 24, 1996 cannot be deemed to be a mere amendment, and in no case an amendment which would relate the proceeding back for purposes of Rule 4007(c) and bring the commencement of the Adversary Proceeding within the time frame required by that Rule. A proper adversary proceeding to determine the dischargeability of the Debtor's alleged debt to the Lanovara Estate was commenced then only on April 24, 1996.

Attorney Leonardo, although he may not practice regularly in the Bankruptcy Court, does practice regularly in the District Courts for the Western District of New York. As such, he is aware that civil actions under the Federal Rules of Civil Procedure are generally commenced by the filing with the clerk of a separate complaint, which is properly signed by at least one attorney of record, and is accompanied by an appropriate filing fee and a prepared summons to be issued by the clerk so that proper service can be effected on the defendant. This general procedure to be followed when commencing a civil action in Federal Court is the same when commencing an adversary proceeding in Bankruptcy Court as set forth in the Court Notice and the Rules of Bankruptcy Procedure.

III. NOTICE TO THE DEBTOR AND THE COURT

The Lanovara Estate contended in its oral argument and submissions that the Debtor received proper and timely notice of its claim of nondischargeability. It was alleged that: (1) the Complaint was served upon Attorney Kirby post-petition and prior to February 27, 1996, when the Lanovara Claim was filed, and April 15, 1996, the deadline to file complaints under Section 523(c); and (2) because the Complaint included causes of action for fraud and conversion, it was apparent that the Estate had alleged that its claim was nondischargeable. However, it appears from the Affidavit of Attorney Kirby and the Debtor's oral argument and submissions that when the Summons and Complaint were served upon Attorney Kirby they were received and understood by him only as amended pleadings in the State Court Action. The Affidavit of Attorney Kirby indicated that: (1) the Estate commenced the State Court Action in November,

1995; (2) the Debtor interposed an Answer with defenses on January 16, 1996 (post-petition) which also advised the Estate of the Debtor's bankruptcy and the automatic stay; (3) the February 20, 1996 cover letter from Attorney Leonardo to Attorney Kirby which accompanied the Summons and Complaint read in pertinent part: "[e]nclosed please find time-stamped copy of the Verified Amended Complaint filed this date in the Monroe County Clerk's Office regarding the above-captioned" [the Estate of Santo D. Lanovara]; (4) despite the Debtor's Answer, the cover letter did not attempt to explain why the service of these papers was in connection with the Debtor's bankruptcy case and did not violate the automatic stay; and (5) when he received the Complaint, Attorney Kirby advised Attorney Leonardo that he believed that an amended pleading was not timely under New York Law and, for the second time, that continuing the State Court Action was a violation of the automatic stay. A review of the Complaint and the circumstances under which it was served and received, as well as the failure of the Estate to respond to Attorney Kirby's rejection of the Complaint and notice regarding the automatic stay, indicates that the Debtor and his representative were not aware that it was the Estate's intention by service of those pleadings to seek a determination that his alleged debt to the Estate was nondischargeable. On the facts presented, I find that when the Complaint was served upon Attorney Kirby in the pending State Court Action it would not have indicated to him or the Debtor that the Lanovara Estate, by the service of those papers, was attempting to have his debt determined to be nondischargeable pursuant to Section 523(c) and Rule 7001.

The Lanovara Estate also contended in its oral arguments and submissions that the Court received proper and timely notice of its claim of nondischargeability. Although the Lanovara

Claim, which was never served upon the Debtor or any of his attorneys, listed the basis for the claim as fraud, theft and conversion, it did not otherwise indicate that the claimant had or intended to commence an adversary proceeding or otherwise request that the Court make a determination regarding the nondischargeability of the alleged debt. Even if such an intention had been set forth on the Lanovara Claim, the deputy clerks who accept unsecured proofs of claim for filing do not have a duty to review the substance of the claims when they are filed, but simply accept them for filing. Reviews of the substance of unsecured proofs of claim generally are only made by debtors, trustees, or other parties in interest in connection with the possible distribution of the assets of an estate, and then usually only for the purpose of determining whether an objection to the claim should be made. This most often occurs well after the time set for filing complaints under Rule 4007(c). In addition, it is not the duty of the deputy clerks who accept proofs of claim for filing or docket them to review any of the attachments to the claims. Furthermore, unless they are the subject of a controversy, the Bankruptcy Judge does not review and is not made aware of specific proofs of claim.

It was also alleged at the oral argument that Attorney Leonardo had consulted an unnamed deputy clerk as to the procedure for having a claim determined to be nondischargeable, and that he was advised that the filing of a proof of claim would accomplish that. My experience with the Clerk's office for the Bankruptcy Court for the Western District of New York over the past twenty years, both as a practioner and as a bankruptcy judge, make it impossible for me to accept that allegation. All of the deputy clerks are extremely well trained and familiar with the need to file an adversary proceeding to have the Court make a determination if there is an allegation that

a debt is nondischargeable. I am certain that no deputy clerk in the Western District would advise an attorney that a determination of dischargeability would result from the mere filing of a proof of claim. Although a conversation with a deputy clerk may have occurred, I am sure it was not exactly as alleged.

CONCLUSION

The Motion to Dismiss is in all respects granted, the Cross Motion is in all respects denied and the Adversary Proceeding is dismissed with prejudice, as being commenced after the time set by the Rules of Bankruptcy Procedure and the Section 341 Notice issued by the Court.

IT IS SO ORDERED.

_____/s/_____

HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: July 19, 1996